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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/628,859

07/28/2003

Thomas R. Hetzel

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06/23/2005

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EXAMINER

D ADAMO, STEPHEN D

ART UNIT

PAPER NUMBER

3636

DATE MAILED: 06/23/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 10/628,859	<b>Applicant(s)</b> HETZEL ET AL.	
	<b>Examiner</b> Stephen D'Adamo	<b>Art Unit</b> 3636	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 01 April 2005.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-26 and 55-58 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-26 and 55-58 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 01 April 2005 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \*    c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## DETAILED ACTION

### *Drawings*

1. The drawings were received on April 1, 2005. These drawings are acceptable.

### *Claim Rejections - 35 USC § 112*

2. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1-26 and 55-58 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter, which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

Specifically, the amendment of claim one recites, "the lower surface of the human interface portion and the first complementary portion of the interlocking structure having a contour substantially different from the support contour of the upper surface of the human interface portion" which is not disclosed. As seen in Figure 4, the upper surface is substantially similar to the lower surface and first complementary portion.

3. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-26 and 55-58 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

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It is indeterminate as to whether applicant's independent claims, each individually assessed as a whole, are drawn to an apparatus per se or to the combination of an apparatus and *a modular seat cushion including a seat support to which the cushion is supported*. The conclusion is reached for the reason that the opening recitation of the preamble in applicant's claim sets forth that the claimed invention is to "an apparatus" or *a modular seat cushion*. This opening recitation is followed by a recitation that the claimed apparatus is *"for supporting a person against a seat support structure of a predetermined configuration."* However, further within the claims, the applicant positively claims *"the seat support structure"*.

Claim 1 recites "a lower surface defining a first complementary portion of an interlocking structure" and then further recites "the lower surface... and the first complementary portion", which is confusing and unclear. As understood, the lower surface has a first complementary portion. However, the claim further recites "the lower surface and the first complementary portion". It is unclear whether the lower surface has a first complementary portion or if the first complementary portion is different from the lower surface.

#### ***Claim Rejections - 35 USC § 102***

4. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an

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international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1, 8, 9, 12-16, 19 and 55 are rejected under 35 U.S.C. 102(e) as being anticipated by Lampel (6,625,830).

Lampel discloses a wheelchair cushion comprising a human interface portion 24 having an upper surface 25 and 26 defining a support contour and also having a lower surface (unlabeled but located on the underside of portion 32) defining a first one of two complementary portions of an interlocking structure. The cushion also comprises a base portion 30 having an upper surface defining a second one of the two complementary portions and also having a lower surface defining a contact configuration when placed on a seat support structure. The second complementary portion interconnects with the first complementary portion. The contact configuration of the base portion (lower surface of 30) has a predetermined shape, complementing at least a portion of a seat support structure on a wheelchair. Further, the first and second complementary portions extend over the entire area of the lower surface of the human interface portion and the upper surface of the base portion. Also, the contact configuration extends over the entire area of the lower surface of the base portion. Both of the complementary portions are of a substantially complementary shape to one another. Moreover, the lower surface of the human interface portion includes a protrusion that interconnects into the recesses formed in the upper surface of the base portion, between the adductor elements 14 and abductor elements 16. The portions of the lower surface of the human interface portion adjacent the protrusion has a complementary shape to a portion of the upper surface of the base

portion adjacent the recess. Lampel also teaches of a covering 28 that encases the human interface portion and the base portions.

The upper surface of the base portion 30 and the second portion of the interlocking structure have a contour substantially different from the contact configuration of the lower surface of the base portion. Specifically, the upper portion of the base portion includes a pommel 16 wherein the lower surface of the base portion is flat. Also, the lower surface 32 of the human interface portion and the first complementary portion of the interlocking structure have a contour substantially different from the support contour of the upper surface 24 of the human interface portion. Specifically, the curves are greater while the "flat" portions are longer.

*Claim Rejections - 35 USC § 103*

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 2-7 and 20-23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lampel (6,625,830) in view of Saloff et al. (4,643,481).

Lampel discloses a wheelchair cushion comprising a human interface portion 24 having an upper surface 25 and 26 defining a support contour and also having a lower surface (unlabeled but located on the underside of portion 32) defining a first one of two complementary portions of an interlocking structure. The cushion also comprises a base portion 30 having an upper surface defining a second one of the two complementary

portions and also having a lower surface defining a contact configuration when placed on a seat support structure. The second complementary portion interconnects with the first complementary portion. The contact configuration of the base portion (lower surface of 30) has a predetermined shape, complementing at least a portion of a seat support structure on a wheelchair. However, Lampel fails to expressly disclose that the human interface portion and the base portion are made up of a plastic. Yet, Saloff teaches of a seat system for preventing decubiti including a base portion 46 and a human interface portion 48. Both portions are molded from plastic. It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the cushion of Lampel with a plastic material, as taught by Saloff for providing a more durable wheelchair seat cushion. Regarding claims 4-6, the patentability of a claim to a product does not depend on merely a difference in its method of production, but on whether the product itself is new and unobvious. If the product in a product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process. When the prior art discloses a product which reasonably appears to be either identical with or only slightly different than a product claim in a product-by-process claim, the burden is on the applicant to present evidence from which the examiner could reasonably conclude that the claimed product differs in kind from those of the prior art. This burden is NOT discharged solely because the product was derived from a process not known in the prior art.

Regarding claims 20-23, Saloff teaches that top member 48 nests in bottom member 46.

Further, Saloff discloses, "In practice, base 10 may be molded in a variety of sizes in

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order to approximately fit each user....cushion 12 can be used in combination with base 10 to more precisely fit the seating system of this invention to the anatomy of an individual user. Base 10 may be constructed of plastic or any other material having adequate strength which can be fabricated in the shapes just described" (col.4, lines 41-48). It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the cushion of Lampel with the teaching of Saloff to produce a variety of sizes and shapes to more precisely fit the user of the wheelchair. Note, one skilled in the art would recognize that the contact configuration of a base would change according to the support presented with a wheelchair, whether it's a sling support, a plate support, a pan support, etc.

Claims 10, 11, 24-26 and 56-58 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lampel (6,625,830) in view of Morrison et al. (5,088,747).

Lampel discloses a wheelchair cushion comprising a human interface portion 24 having an upper surface 25 and 26 defining a support contour and also having a lower surface (unlabeled but located on the underside of portion 32) defining a first one of two complementary portions of an interlocking structure. The cushion also comprises a base portion 30 having an upper surface defining a second one of the two complementary portions and also having a lower surface defining a contact configuration when placed on a seat support structure. The second complementary portion interconnects with the first complementary portion. The contact configuration of the base portion (lower surface of 30) has a predetermined shape, complementing at least a portion of a seat support structure on a wheelchair. However, Lampel fails to expressly disclose a seat support



structure. Morrison teaches of a wheelchair seating system comprising a seat support structure 110. The seat support structure of Morrison complements the entire contact configuration of Lampel. Further, the seat support structure is a sling seat. It would have been obvious to one having ordinary skill in the art at the time the invention was made to use the wheelchair cushion of Lampel with the wheelchair and specifically, the seat support sling of Morrison, for providing an adequate support for Lampel's seat cushion. Moreover, Lampel fails to expressly disclose that the base portion and the seat support structure are essentially the same element. As understood, the two elements have been combined to form a single element. It would have been obvious to one having ordinary skill in the art at the time the invention was made to combine the base portion 30 with the wheelchair seat support structure 90 of Morrison, since it has been held that forming in one piece an article which has formerly been formed in two pieces and put together involves only routine skill in the art. Furthermore, the seat support structure would include a back wall, seen in Figure 3, which extends vertically upward from the base portion at a location to contact the back of the upper torso of the user.

***Allowable Subject Matter***

6. Claims 17 and 18 would be allowable if rewritten to overcome the rejection(s) under 35 U.S.C. 112, 2nd paragraph, set forth in this Office action and to include all of the limitations of the base claim and any intervening claims.

*Response to Arguments*

7. Applicant's arguments, see page 18 of remarks, filed April 1, 2005, with respect to claims 17 and 18 have been fully considered and are persuasive. The 35 USC 103 rejection of claims 17 and 18 has been withdrawn.

8. Applicant's arguments filed April 1, 2005 have been fully considered but they are not persuasive.

Regarding the indefiniteness rejection, the applicant states that the seat support structure is merely "the environment with which the modular seat cushion interacts" (page 15, lines 4-5). However, the "seat support structure" is positively claimed throughout the claims and includes limitations that further limit the claims. Therefore, it is indefinite whether the invention is merely a modular seat cushion or a modular seat cushion in combination with a seat support structure.

Applicant's arguments with respect to claims 1, 8, 9, 12-16, 19 and 24-26 have been considered but are moot in view of the new ground(s) of rejection.

Applicant's argument that Saloff fails to teach of a "resilient plastic material was considered. Saloff teaches of a plastic material. Even though the base portion is rigid, the base portion is plastic and thus includes some resilient properties.

Furthermore, regarding claims 4-6, the patentability of a claim to a product does not depend on merely a difference in its method of production, but on whether the product itself is new and unobvious. *In re Pilkington*, 411 F.2d 1345, 1348, 162 USPQ 145, 147 (CCPA 1969). If the product in a product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product

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was made by a different process. *In re Marosi*, 710, 710 F.2d 799, 803, 218 USPQ 289, 292-93 (Fed. Cir. 1983); *Johnson & Johnson v. W. L. Gore & Associates, Inc.*, 436 F. Supp. 704, 726, 195 USPQ 487, 506 (DC Del. 1977); see also *In re Fessmann*, 489 F.2d 742, 180 USPQ 324 (CCPA 1974) and *In re Thorpe*, 777 F.2d 695, 227 USPQ 964 (Fed. Cir. 1985). When the prior art discloses a product which reasonably appears to be either identical with or only slightly different than a product claim in a product-by-process claim, the burden is on the applicant to present evidence from which the examiner could reasonably conclude that the claimed product differs in kind from those of the prior art. *In re Brown*, 450 F.2d 531, 173, USPQ 685 (CCPA 1972). This burden is NOT discharged solely because the product was derived from a process not known in the prior art. *In re Fessman*, supra.

Regarding arguments directed to claims 20-23, Saloff does teach of “different upper layers to accommodate differences in the anatomy of the user” (remarks, page 20, lines 11-12). AS stated in the above rejection, Saloff discloses, “In practice, base 10 may be molded in a variety of sizes in order to approximately fit each user....cushion 12 can be used in combination with base 10 to more precisely fit the seating system of this invention to the anatomy of an individual user. Base 10 may be constructed of plastic or any other material having adequate strength which can be fabricated in the shapes just described” (col.4, lines 41-48).

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*Conclusion*

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Stephen D'Adamo whose telephone number is 571-272-6857. The examiner can normally be reached on Monday-Friday 6:00-2:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Pete Cuomo can be reached on 571-272-6856. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.


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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

SD

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June 20, 2005

  
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